No. 87-1738

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In The
Supreme Court of the United States
October Term, 1988

CREATIVE BATH PRODUCTS, INC.,
MATHIAS MEINZINGER AND GUNTHER BARTSCH,
Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY
AND ROBERT FERINA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

REPLY BRIEF

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PRELIMINARY STATEMENT

The Petitioners respectfully submit this brief in reply to the opposing brief of the respondents. The reply is necessitated by certain misleading statements and arguments made by counsel for respondent and by developments in the Second Circuit with regard to the precedental value of this cause below and the subject of RICO enterprises in general.

AS TO RESPONDENTS' COUNTERSTATEMENT OF THE CASE

Respondents claim that, in their opinion, this is a "garden variety" fraud situation which the RICO statutes were not intended to reach. We submit that this is a fraud situation in the business marketplace which, as stated in substance by Circuit Judge Pratt at a RICO conference recently,—Why should business fraud be any different from any other fraud and not be circumscribed by the RICO statute?[1]

Defendants argue further in their factual statement that as the cover page of the policy states that the policy may be returned within ten (10) days and the boilerplate statement of understanding of policy terms appears thereon, there could have been no fraud perpetrated by the defendants herein.

This Court, from a review of its decisions, does not live in an ivory tower. We know that no doubt the Justices of this Court realize the mechanics of applying for life insurance policies and the fraud attended upon the public by unscrupulous sales persons and insurers, notwithstanding boilerplate language, type style, and statutory policy language. In this cause, the value of the policy was misleadingly stated to be of a certain amount when, in fact, no disclosure was made by the agent of the surrender

1. Respondents, in an attempt to muddy the waters, give a slanted procedural history of this case in their footnote 2. They state that we saw fit not to submit a memorandum of law in opposition to the respondents' motion to dismiss. The respondents' motion to dismiss spoken of is the second motion to dismiss made on renewal after a decision on a "first" motion to dismiss after which an amended complaint had been served. The legal points and authorities of the plaintiff were fully and adequately submitted to the Court on the first motion to dismiss and there was no reason to burden the Court with a second submission on the renewal motion subsequently made.

charges which cancelled out the value of the policy. Furthermore, there were outright lies placed in the application as to replacement of the policy and to the petitioners as to return of the policy. Dishonest acts, by use of the mails and wires, are not legitimized by inclusion of boilerplate language in policies of insurance.

Respondents argue that insurance is a regulated industry and that defendant/insurer has been in the insurance business for a hundred years. These factual situations have never stopped anyone from the commission of racketeering and fraudulent acts. Insureds are constantly receiving unfair and fraudulent treatment at the hands of *some* large insurers.

The District Court did *not* dismiss the action on the grounds of the failure to prove fraud. For, of course, such proof would necessitate a trial on the merits. The District Court found that two acts or more in the furtherance of a single scheme are not sufficient under RICO. The Circuit Court, in its opinion, makes clear that the District Court *erred* in its statement that two acts in a single scheme are not sufficient under RICO as one scheme is sufficient as long as the acts are multiple.

The Circuit Court decided this case after discussing the error of the District Court in finding a single scheme insufficient on the basis of a new theory of law being advanced by the Second Circuit. This theory which, as stated in our main brief, is in conflict with a host of decisions of this Court and courts around the country, is, that the enterprise required under RICO be one which is continually criminal in nature. As stated in our main brief, if that were the case, the cases cited in our main brief in which RICO was found to have been properly applied would all have had opposite results.

REASONS FOR GRANTING THE WRIT

Respondents claim that the writ herein should be denied as this case, according to them, does not warrant review by this Court and the issues presented in the petition are already before this Court. Respondents state that we have misconstrued the Second Circuit's decision in this case. They go on to say that our appeal to the Second Circuit was based upon the question of whether the RICO statute requires multiple schemes to constitute a pattern of racketeering activity. In fact, that was a basis of the appeal to the Second Circuit. It is a further fact that the Second Circuit found that the District Court *erred* in requiring multiple schemes as opposed to the single scheme upon which the plaintiffs relied. However, for the first time in this action, the Second Circuit adopted the novel theory of law as to criminal continuity of the enterprise upon which this appeal and this request for certiorari is based.

Ironically, respondents apparently agree with petitioner that an enterprise need not be criminal in its continual nature. They state: "The Second Circuit has never required nor does their decision herein hold, that a RICO enterprise be an unlawful operation." (Cases cited omitted.) (Respondents' brief at 6-7) However, a reading of the Second Circuit's opinion in this case clearly shows as follows:

> "Our cases since *Ianiello* have interpreted the 'continuity plus relationship' factor emphasized in *Sedima* and adverted to in *Ianiello*, as requiring that the plaintiff establish the existence of an enterprise whose illicit activities or unlawful goals are continuing ones." (Decision of the Second Circuit below.)

Clearly, the Second Circuit is requiring that the enterprise have continuing illicit and unlawful goals. In plain

English, that means that the enterprise is a continuing criminal enterprise, thus effectively taking RICO out of the purview of all those cases where legitimate enterprises have been subverted for racketeering activity. Exemplary thereof are the cases involving city agencies and other governmental agencies which were subverted for racketeering purposes. When the persons conducting the racketeering were caught, there was no question that the racketeering stopped. If the Second Circuit's opinion were to be the law of the land, then one would be hard pressed to say that after the racketeers were caught the municipal and state agencies involved of necessity had continuing illicit activities and unlawful goals.

The respondents state that the issues in the petition are already before this Court and that a better case to be determined by this Court is the *Beauford v. Helmsley* case now *sub judice en banc* by the Second Circuit and previously reported at 843 F.2d 103 (2d Cir. 1988), and *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F2d 648 (8th Cir. 1988), cert. granted 56 U.S.L.W. 3647 (March 21, 1988). While *H.J. Inc., supra,* apparently has as the question therein the number of schemes required to constitute a pattern, it does not address the new theory advanced by the Second Circuit in this case of a requirement that the enterprise continue to be criminal. The Second Circuit has denied our motion to be heard jointly with *Beauford, supra,* and this case is, in fact, ready for review at this time. This case has, in fact, been adopted as one of the pillars of RICO in the Second Circuit and continually cited for this new theory advanced by the Second Circuit of a requirement of the enterprise required to continue being a criminal enterprise. Thus, as recently as June 23, 1988, District Judge Lasker in *Cullen v. Paine Webber Group, Inc. et al,* Docket #87CIV.2048, appearing at 1988 U.S. Dist. Lexis 5957 __ F.Sup. __ states: "as regards this

action that *Ianiello* and its progeny require that the plaintiff establish the existence of an enterprise whose illicit activities or unlawful goals are continuing ones."

In that case the Court points out that upon the accomplishment of the goal there was no further suggestion of criminal activity continuing. If that be the case then all the RICO actions cited in our main brief involving state and city agencies would have no RICO foundation as there is no suggestion that those agencies had continuing criminal activity.

On June 29, 1988, District Judge Conner of the Southern District of New York, in deciding *Banque Worms S.A. v. Messrs. Worms et Cie, et al,* __ F. Supp __ (SDNY 1988), addressed the plaintiff in that case to the decision of the Circuit Court in this case to determine his future pleading in that action. In *Bruce v. Thomas A. Martin et al.,* Docket #87CIV7737, appearing at 1988 U.S. Dist. Lexis 327 and Federal Securities Law Reported CCH P93, 927, District Judge Sweet of the Southern District of New York dismissed the RICO claim therein because "the RICO claim cannot stand, however, because the complaint fails to allege 'the existence of an enterprise whose illicit activities or unlawful goals are continuing ones.' *Creative Bath Products Inc. v. Connecticut General Life Insurance Co.,* 837 F.2d 561, 564 (2d Cir. 1988)."

In *DeLyon v. Fravola et al,* Docket #87CIV0187, appearing at 1988 U.S. Dist. Lexis 3579__F.Sup__decided on April 28, 1988, District Judge Keenan cites this case as the leading Circuit Court decision in this area for the proposition that "this Circuit interprets this factor to require 'the existence of an enterprise whose illicit activities or unlawful goals are continuing ones.' *Creative Bath Products Inc. v. Connecticut General Life Insurance Co.,* 837 F.2d 561, 564 (2d Cir. 1988)."

The Court then goes on to state therein "in *Creative Bath, Albany Ins.* and *Beck,* the Second Circuit affirmed dismissals of [the] RICO count where the alleged scheme had a single, short-lived goal. Whether one seeks to characterize a pleading as containing multiple schemes, or a single scheme, a plaintiff must present the situation that manifests a threat of continuing criminal activity."

This cause has become a "cause celebre" as the leading RICO case setting forth the law of the Second Circuit—at the least that for a RICO case to be sufficient the enterprise msut continue as a criminal one. As stated in our main brief, such a ruling would obliterate prosecution of racketeers for infiltration and operation enterprises by racketeering activity. Anytime the racketeering activity is arrested, the continuing criminal nature of the enterprise ceases and the racketeering activity could no longer be prosecuted.

We submit that this cause requires review by this Court as otherwise continuing reliance upon the decision below by the Courts throughout the country will obliterate the intent of Congress in the enactment of the RICO statute.

We have no objection to respondents' suggestion that the appeal herein be heard together with the appeal in *H.J. Inc., supra.* As the Circuit has refused re-consideration of this case together with its *en banc* hearing in *Beauford, supra,* we submit that determination of this Court need not await that cause. In fact, a determination of the proper RICO laws to enterprise in this case would be either a guiding light to the Second Circuit in its future decision in *Beauford, supra,* or in case of conflict with its future decision in *Beauford, supra,* would result in judicial economy by the non-reliance of Courts throughout the land on such decision.

CONCLUSION

It is respectfully submitted for the stated reasons that the petition for certiorari be granted.

Respectfully submitted,

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